

ORIGINAL
Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

EX PARTE OR LATE FILED

In the Matter of Promotion of Competitive Networks in Local)
Telecommunications Markets)

WT Docket No. 99-217

RECEIVED

OCT 29 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Wireless Communications Association International, Inc. Petition)
for Rulemaking to Amend Section 1.4000 of the Commission's)
Rules to Preempt Restrictions on Subscriber Premises)
Reception or Transmission Antennas Designed To Provide Fixed)
Wireless Services)

Cellular Telecommunications Industry Association Petition for)
Rule Making and Amendment of the Commission's Rules to)
Preempt State and Local Imposition of Discriminatory And/Or)
Excessive Taxes and Assessments)

Implementation of the Local Competition Provisions in the)
Telecommunications Act of 1996)

CC Docket No. 96-98

**FURTHER REPLY COMMENTS OF CONCERNED COMMUNITIES AND
ORGANIZATIONS**

CA: City of Benicia, City of Cerritos

CO: City and County of Denver, City of Lakewood, and Greater Metro Telecommunications Consortium

FL: City of Alachua, City of Coconut Creek

IL: City of Marshall, Village of Lisle and the Illinois Chapter of NATOA consisting of the City of Chicago, Cook County, and approximately 50 other Illinois municipalities

IN: City of Carmel

MI: City of Detroit, PROTEC (Michigan Coalition to Protect Rights of Way) and 22 other municipalities

OR: League of Oregon Cities, Metropolitan Area Communications Commission:

TX: City of Fort Worth and 16 other municipalities

WA: City of Bellingham, City of Medina

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October 28, 1999

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In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets)

WT Docket No. 99-217

Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services)

Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments)

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996)

CC Docket No. 96-98

FURTHER REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

Concerned Communities and Organizations ("CCO") responds as follows to the Further Reply Comments of the Wireless Communications Association ("WCA").

Government Buildings: WCA now states that the proposed rule on wireless antennas and wiring should not apply to government buildings. WCA Further Reply Comments at 13. Although WCA gives no reason for its statement, other than that it only intended the rule to apply to private property, presumably its reasoning in part tracks the concerns and objections raised by municipal commentators, such as CCO and the City and County of San Francisco.

It does not appear that any other commentator has asked that the rule apply to government buildings.

There thus appears to be a consensus, such that any rule adopted by this Commission should state on its face that "it does not apply to any building or property owned or occupied by a unit of state or local government."

Should the Commission adopt on rule on this matter, WCA's Further Reply Comments thus help narrow the issues of what properties the rule should apply to.

WCA Petition: WCA at several points expresses concern that CCO may be addressing points that the WCA did not include or intend in its Petition for Rulemaking.

For example, WCA objects to CCO's opposition to utilities condemning space in buildings for wiring or on rooftops for antennas as not part of its Petition (WCA Further Reply Comments at 10-11) but then goes on to state that WCA supports just such an application of the condemnation power as suggested by the Commission in the Notice of Proposed Rulemaking.

Although WCA may have filed a Petition for Rulemaking which helped lead to this proceeding, as the example just given indicates the Notice of Proposed Rulemaking and comments raise questions, concerns and suggest changes that vary from the Petition. CCO's Reply Comments address such points. Objections that these points were not included in WCA's original petition are not well founded.

Safety Code Preemption: WCA's argument that the proposed rule does not preempt safety codes is either a concession or disingenuous.

To the extent WCA truly means that under no circumstances should any rule adopted in this proceeding preempt state or local safety codes, it should say so and be done with it. The balance of its Further Reply Comments would then be largely unnecessary and this proceeding could be somewhat narrowed.

Again, if this is what the WCA means it serves the useful purpose of narrowing this proceeding.

But WCA does not appear to mean this. For example, it says that the proposed rule "*would preserve the authority of local governments to protect public safety in accordance with the existing parameters of the rule.*" WCA Further Reply Comments at 6-7, italicization in the original, emphasis supplied.

As is undisputed, the "existing parameters of the rule" have been interpreted by this Commission to preclude enforcement of safety and safety type codes. See In re Star Lambert and Satellite Broadcasting

Association of America, DA 97-15554 (July 22, 1997) where the Commission ruled that under Rule 1.4000.

- The City of Meade, Kansas may not require a \$5 permit prior to installation of a satellite dish.
- That City may not require City approval of the dish location
- That City's property setback regulations are preempted
- That City may not impose a \$500 per day fine for violating City safety codes.

It is Rule 1.4000 which the WCA now wants extended to fixed wireless dishes. WCA's statement that the proposed change would preserve local safety code authority "*in accordance with the existing parameters of the rule*" is shown for what it is by this and related rulings.

In plain English, WCA and industry are asking the Commission to preempt many safety codes. Local governments are charged with protecting public safety. Safety codes are a major means to this end. CCO's Reply Comments describe the general types of hazards that safety related codes may protect against on matters related to the Notice of Proposed Rulemaking. Local governments thus must oppose such preemption. They will be successful, hopefully by persuading this Commission of the error of the industry position, and if not, through the courts.

No Attempt to Identify, Resolve Problems: In it's Reply Comments CCO made the fundamental point that this Commission should not act to preempt safety, health or other codes until there has been a clear identification of the specific problems (if any) in question and an attempt by the wireless industry to work with the various national code organizations or other entities to attempt to resolve (or at least narrow) the issues. CCO Reply Comments at 7-9. CCO believes there is a strong likelihood that such an effort would lead to the issues (if any) being amicably resolved. At minimum, the specific safety issues that might be in dispute would be well framed for action by this Commission (e.g--what are the specific safety code sections in dispute, what are the proposals and what are their pros and cons).

In it's Further Reply Comments WCA claims that it has been rebuffed by BOCA "at every turn".

WCA Further Reply Comments at 9, footnote 23. The only basis for this contention is an ex parte presentation by WCA in the Section 207 implementation proceedings two and half years ago where “WCA asserted that BOCA failed to give [it’s installation method proposal] adequate consideration.” “Order on Reconsideration”, *Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over the Air Reception Devices; Television Broadcast Service and Multi-channel, Multi-point Distribution Service*. FCC 98-214, CS Docket 96-83 (1998) at footnote 101.

CCO has identified at least five national code organizations whose codes are implicated by the Notice of Proposed Rulemaking. These include the Building Officials and Code Administrators International (BOCA), International Conference of Building Officials, Southern Building Code Congress International, National Fire Protection Association and the Institute of Electrical and Electronics Engineers. See CCO Reply Comments at pages 3-4 for a full description of these organizations and their respective codes.

CCO respectfully submits that one (or even a few) meetings with BOCA several years ago falls far short of the needed concerted industry effort to meet with all the code organizations listed above on matters implicated by the Notice of Proposed Rulemaking to attempt to resolve matters. However, WCA’s Further Reply Comments are helpful in indicating that it recognizes some need to meet and work with these code organizations.

For the reasons set forth above the Commission should not adopt the proposed rule (at least as to safety codes) until the wireless industry has made a concerted effort to meet and work with these national code organizations to resolve safety and safety related code issues.

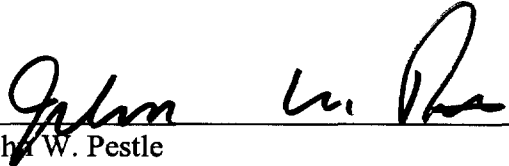
Other: WCA’s arguments that Section 332 (c)(7) does not prohibit the proposed rule change are incorrect. The language of the statute is clear in it’s definition of “personal wireless service facilities”. This is shown, for example, by the fact that some industry commenters agree that wireless common carrier exchange services are squarely covered by Section 332 (c)(7). See, for example, Comments of Teligent, Inc.

at 47.

WCA contends that Executive Order 13,132 is not applicable to the Commission because it is an "independent regulatory agency." Even if this is true the order by its terms "encourages" such agencies to comply with the Order.

And for the reasons set forth in the Executive Order it protects "the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution." Because it represents such fundamental values of a Constitutional nature this Commission should comply with the spirit if not the letter of the Executive Order. It should not disregard it as WCA suggests.

Respectfully submitted,



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October 28, 1999

CERTIFICATE OF SERVICE

I, Kim Van Dyke, a secretary at the law firm of Varnum, Riddering, Schmidt & Howlett LLP, hereby certify that on this 28th day of October, 1999, I sent by first class mail, postage prepaid, a copy of the foregoing comments to the persons listed below.

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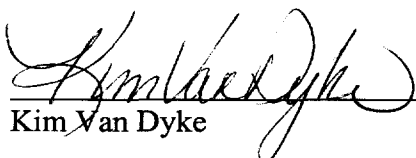
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